



Legal Update

Search Warrants for Tower Dumps Must be Signed by Judge and Contain Protocols for Disposal of Unrelated Information

Commonwealth v. Jerron Perry (SJC April 1, 2022)

Relevant facts

There were 6 armed robberies that took place between September 22, 2018 and October 31, 2018 in Boston, Canton and Cambridge. On October 6, 2018 there was an attempted robbery in Boston where the store clerk was shot and killed. There was also a suspected getaway driver in at least three of the robberies.

Investigators believed the robberies may have been perpetrated by the same person because they all involved clerks at either convenience stores or gas stations being robbed at gunpoint. The descriptions given of the male perpetrator in the various robberies were also similar.

In an effort to identify the perpetrator, investigators requested two search warrants for tower dumps for cell site location information (CSLI). The warrants sought data for devices that connected to cell sites serving the areas of the robberies around the time of the robberies. Officers wanted to cross-reference the information to identify any numbers that appeared in two or more of the tower dumps.

Both warrants issued, the first for tower dumps related to the first four robberies and the second for the remaining two robberies and the October 6 attempted robbery/homicide. The search warrants produced information on over 50,000 telephone numbers. After analysis and additional investigation, officers were able to link the defendant's number and that of the getaway driver to two of the incidents. The defendant's phone was in communication with the getaway driver's phone around the time of the shooting on October 6.

Investigators identified the defendant as the perpetrator in six of the seven incidents and he was indicted on numerous charges. The defendant moved to suppress the evidence obtained as a result of the tower dumps arguing that the tower dumps were an unconstitutional search. A Superior Court judge denied the motion and the defendant appealed.

For specific guidance on the application of these cases or any law, please consult your supervisor or your department's legal advisor or prosecutor.

Discussion

Was there a search?

The court applied the mosaic theory that we have seen in recent years in cases involving pole camera surveillance and targeted CSLI. Instead of looking at each action of investigators individually, the mosaic theory looks at the governmental actions as a whole and all of the information collected as a result of those actions to see whether the conduct provided investigators with “otherwise unknowable details” about the subject’s life.

The court found that the actions taken by investigators in this case, “viewed in their entirety, provided investigators with information of a highly personal and private nature.” Investigators could locate individuals in private and public settings, could get insight into associations of the user, and, because of the length of time, could identify patterns of behavior by piecing together where people were, who they were with, and who they were communicating with on multiple occasions.

“In light of these facts, and in the totality of the circumstances, the collection and subsequent analysis of the seven tower dumps at issue here provided investigators with highly personal and previously unknowable details of the defendant’s life. Accordingly, the Commonwealth’s use of the seven tower dumps intruded upon the defendant’s reasonable expectation of privacy.”

It did not matter that the tower dumps only produced a total of three hours of CSLI. In Commonwealth v. Estabrook, 472 Mass. 852 (2015) the court held that six or fewer hours of continuous targeted CSLI was not a search. In finding the tower dumps in this case to be a search the court explained that information about smaller increments of time over several days can reveal a pattern of behavior that could not be discerned from monitoring someone for only part of one day.

“Accordingly, although Estabrook enables the Commonwealth to obtain one or more tower dumps spanning six hours or less without a warrant, it provides no refuge where, as here, the tower dumps span multiple days.”

Were the warrants supported by probable cause?

In addition to showing probable cause that a crime has been, is being, or is about to be committed, a warrant for CSLI must establish a nexus between the criminal activity and the physical location of a cell phone. The nexus for CSLI information will be satisfied if there is a substantial basis to conclude that the suspect used a cell phone during the relevant time frame. If this is established, then there is probable cause to believe that the CSLI sought would produce evidence of the crime.

Both warrants here established probable cause to believe the robberies had occurred. The second warrant also established the required nexus. This affidavit contained information about a second person acting as a getaway driver on at least three occasions. This affidavit also included facts to support the belief that the robber and another person communicated with each other from a distance either before or after the robberies, including a statement from the investigator that, “based on his experience and training, violent crimes such as those at issue often require some level of coordination amongst coventurers.”

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Evidence that the robber and getaway driver communicated over a distance, together with the affiant's statement about "the over-all ubiquity of cellular telephones" was enough to establish a reasonable belief that they had used cell phones to communicate with each other.

The first warrant; however, did not provide any particularized information about the robber or getaway driver having a cell phone or communicating with each other over a distance. "Moreover, the first warrant affidavit did not discuss the need for coventurers to communicate when committing a robbery, nor did it point to any evidence that the perpetrator and the coventurer had been separated during the commission of the crime such that they would have had to communicate from a distance." For these reasons, the evidence obtained pursuant to the first warrant must be suppressed.

Was the second search warrant particular enough to properly limit the scope of the search?

The defendant argued that any warrant that does not identify the targeted suspect by either name or telephone number lacks particularity because art. 14 mandates that warrants describe "with particularity" both the place that will be searched and the item(s) to be seized. The court was not persuaded.

"A cursory examination of anonymized CSLI would not permit investigators to infer the identity of any given individual, where within the cell site's radius that person had been, or with whom he or she had associated; thus, such an examination would not intrude upon a reasonable expectation of privacy."

The question for the court is whether the warrant "sufficiently limited the set of telephone numbers and their associated CSLI that investigating officers were permitted to analyze, and therefore to search."

The court found that the search was adequately limited in scope here because the warrant permitted investigators to analyze the CSLI for numbers that appeared in two or more of the tower dumps, but no others. Because the warrant only authorized the search of this narrow subset of the CSLI collected, the court found that the warrant was sufficiently particular.

The court did note that the better practice is to limit the search of CSLI to an identified suspect when possible. Obviously that is not possible in cases where the identity of the perpetrator is unknown.

The court recognized the potential to invade the privacy of innocent and uninvolved people whose CSLI is disclosed by such search warrants. "Such a situation presents far too great a risk of unwarranted invasions of privacy, whether intentional or inadvertent, malicious or innocent."

For this reason, the SJC announced a new rule. In the future, any search warrant for tower dumps must be signed by a judge. In addition, the "warrant must include protocols for the prompt and permanent disposal of any and all data that does not fit within the object of the search following the conclusion of the prosecution."

"Henceforth, before acquiring and analyzing a series of tower dumps, the Commonwealth must obtain a warrant from a judge. Before issuing the requested warrant, the judge must ensure that it provides a protocol for the disposal of any data that falls outside the scope of the search."

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